Supreme Court, U.S.
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No. 02-89

In the

Supreme Court of the United States

SANDY G. TOLLETT,

Petitioner,

v.

CITY OF KEMAH, TEXAS
and WILLIAM S. HEFLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

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Respondents, the City of Kemah, Texas (the "City") and William S. Helfand ("Helfand") appear to file this brief in opposition to the petition for certiorari of Petitioner Sandy S. Tollett ("Tollett").

RESPONSE TO TOLLETT'S STATEMENT OF JURISDICTION

In the preamble of her petition, Tollett requests this Court "to review the judgments" — plural not singular — "of the Fifth Circuit in this case." In the "Opinions Below" section of her petition, she then identifies the two Fifth Circuit decisions she presumably desires the Court to review, the so-called *Tollett I* decision, handed down by the Fifth Circuit in September 1999, and the *Tollett II* decision, handed down on March 6, 2002. Obviously, since Tollett did not file her current petition within 90 days of entry of the *Tollett I* judgment, her petition for review of that judgment is time-barred. Sup. Ct. R. 13(1).

RESPONSE TO TOLLETT'S STATEMENT OF THE CASE

A. Tollett's Underlying Title VII Claim.

As City will discuss below, as one of the prerequisites for obtaining relief from the judgment under any of the subsections of Rule 60(b) is a showing of a meritorious claim or defense, the following statement of facts, not detailed in the Court of Appeals' opinion, is offered to support the City's argument here that Tollett's Title VII claim lacks merit as a matter of law and therefore any retrial of her case would be an exercise in futility.

When the City appointed Tollett to the unpaid position of reserve officer in August, 1993, she was totally inexperienced in police work. (9 Tr. 164). The City requested her to work a minimum of 32 hours per month, or 8 hours per week. (*Id.*, at 169). Although in her petition for certiorari Tollett has described herself as a "*full-time* reserve police officer" (id., at 2), in reality she worked only 40 to 45 hours *per month*, or approximately 10

to 11 hours per week. (9 Tr. 233). The City never paid her any wage or salary and never provided her any benefits, such as life or health insurance. (9 Tr. 216).[1]

In her petition for certiorari, Tollett has attempted to recast the theory of her Title VII claim as a complaint about a work environment "tainted by sexual animus." *See* Tollett's Petition, at 2. No claim for a hostile work environment was pled. Rather, the gravamen of Tollett's suit was that she was required to undergo more field training than unidentified volunteer male reservists.

At trial, Tollett testified that she believed she had completed field training in July 1994, when the chief of police at that time, Gary Harter, told her she was "good to go." (9 Tr. 175-77, 229). She was then assigned to bicycle patrol, as she requested, until September 1994. (9 Tr. 177).

In September 1994, according to Tollett's trial testimony: "I contacted Sergeant Munoz over the telephone and informed him that I was pregnant and I requested to be taken off the streets and off of bicycle patrol for my safety as well as my child's." (9 Tr. 178). Never thereafter did Tollett work for the City. (9 Tr. 179-82, 224-26).

Tollett's child was born in May 1995. When she returned to the Kemah Police Department expecting to resume her volunteer patrol duties in July 1995, a subordinate officer, Capt. Swinney, told her that her she would have to "re-train." (9 Tr. 230, 233). Tollett admitted at trial that she never took the matter up with Chief Harter, the decisionmaker in such matters for the Department. (9 Tr. 234-35, 244-45).

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[1] Tollett testified that on a single occasion, the City paid her a small fee for executing a warrant. However, she did not report the fee on the federal income tax return she filed jointly with her husband; and the City had no record of ever paying her any fee. (9 Tr. 216-18).

Tollett further admitted that the City never fired her. (9 Tr. 202). To the contrary, she simply decided not to resume her reservist duties upon being told by Capt. Swinney that she would need to re-train. (9 Tr. 202, 206, 233-34). Tollett filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in August 1995, almost eleven months after her last day of work as a part-time volunteer. (9 Tr. 191).

There is no evidence that all police reservists who successfully completed field training were appointed to paying jobs. Nor do Tollett's pleadings in this case allege that the City discriminated against her in any hiring decision or that it refused to offer her any *paid* job position because of her sex. She admitted at trial that she never inquired about any of the openings the City had posted for paid police officer positions, and she never applied for any such jobs. (9 Tr. 254).

B. The Discovery Order Compelling The Document Production.

In January 1997, Tollett served the City with interrogatories and requests for production. (R. 220-37). Contrary to Tollett's current characterization of the document request as one seeking the production of the personnel files of officers "similarly situated" to Tollett, it instead called for the production of the complete files of *all* city police officers employed between 1993 and 1996, regardless of whether comparable in any relevant way to Tollett. (R. 222-23). The City objected to the request for the production *en masse* of employee files. (R. 210-14).

In May 1997, Tollett filed a motion to compel. (R. 248). The part of her motion addressed to the production of employee personnel files is vague and appeared concerned only with the files of "comparative officers." (R. 241). The motion's prayer for relief is equally vague, requesting simply that the motion be granted "in all parts." (R. 239).

On June 27, 1997, in a cryptic, one-line order no more specific than Tollett's motion to compel, the District Court stated: "The plaintiff's motion to compel answers to interrogatories and documents (#14) is granted. It is so Ordered." (R. 270).

C. The City Secretary's Affidavit.

In her certiorari petition, Tollett states that the Kemah City Secretary, Kathy Pierce, filed an affidavit "to the effect that" none of the records Tollett had requested even existed, and that Pierce, in her affidavit, "knew her statements would mislead the court." This assertion is false on several levels.

To begin with, Pierce did not "file" her affidavit in court. It was intended as a supplement to Tollett's document request. The genesis of it is as follows: On October 6, 1997, at the pretrial docket call, Tollett's counsel complained to the District Court that the City still had not produced employee files for other officers, to which Mr. Helfand, the city's trial counsel, responded:

> The Plaintiff has asked for – and the Court granted a motion to compel for records and personnel files of employees who were – and I'm using quoted now because these were their words – similarly situated, discriminated against because of a pregnant condition.
>
> We reported that there were no other such employees. There were no other employees who during the time that the Plaintiff was employed even took a leave of absence for a pregnancy purpose let alone who claimed any discrimination as a result of being pregnant.

(7 Tr. 9). To address plaintiff's concerns, Mr. Helfand offered to furnish a no-records affidavit from the city secretary, averring that the City had never employed any "similarly situated" officer.

This proposal, to which plaintiff's counsel offered no objection, also appeared to satisfy the District Judge, who stated: "[P]erhaps [ ] an affidavit is the appropriate way to deal with it in light of my motion because the motion is more than simply a request, it's an order." (7 Tr. 11).

On October 20, 1997, Mr. Helfand sent Tollett's counsel a no-records affidavit executed by Ms. Pierce. (PX 13, 24). Contrary to Tollett's petition for certiorari, Pierce did not "file" it in court, and it certainly was not used to influence the Court's ruling on some motion then pending. The Pierce affidavit states in relevant part:

> The City of Kemah has not had an employee or volunteer who is "similarly situated" as the Plaintiff, Sandy Tollett, in that the Police Department has not had any other employee who was on leave for any reason who had not completed their field training either prior to taking leave or who did not agree to successfully complete the field training program upon their return from leave. Accordingly, the City has no records to produce of any employee or volunteer who is, as described, "similarly situated" to Sandy Tollett.

(PX 24). There is no evidence that anything stated in this affidavit is false.[2]

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[2] In footnote 3 of the District Court's March 2000 sanction order, the Court has labeled the affidavit as "false" . . . "because it fails to inform the Court about lost or destroyed records that had bearing on the representation." (R. 1661). This characterization is plainly wrong since the affidavit does not speak to files of anyone other officers "similarly situated" to Tollett (as the affidavit defines that term), and so Pierce's alleged failure to volunteer information in her affidavit about the files of other employees does not make the affidavit false or perjurious.

D. Helfand's Statement At Docket Call Concerning Non-Existence Of Documents.

Helfand's comments at the October 6 docket call to the effect that virtually all of the employment records kept during Chief Harter's administration were lost or missing was an inadvertent overstatement. Later at trial, as discussed below, Helfand would discover that a large cache of irrelevant employee files from Chief Harter's administration had in fact been retained. Nevertheless, the *training* records which the District Court considered relevant never surfaced, for as the Court itself noted in its March 2000 sanctions order, the training records of "most, if not all, of the relevant officers" (R. 1660) — to the extent such documents ever existed in the first place — remained missing.[3] The same can be said for other categories of

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During Tollett's tenure as an unpaid police officer, the City operated out of a 1400 square-foot converted residence. (9 Tr. 419; 2 Supp. Tr. 88). The Kemah police chief during Tollett's tenure, Harter, was the physical custodian of all of the personnel files of city police officers. Harter's successor, Warren, assumed this role when he became chief on September 29, 1995. He found the files scattered in various locations throughout the building and in a detached temporary shed outside. Warren assembled the files, organized them in folders and placed them in a central location in his office. By the time the case was tried in March 1998, the police employee files had been moved to Warren's office in the new, 3000 square-foot Kemah City Hall building. (9 Tr. 419; 10 Tr. 461; 1 Supp. Tr. 110, 115). As Muñoz testified at trial, each of these personnel files theoretically should have contained the officer's job application, state officer certification, physical fitness records, education records, and disciplinary records. (9 Tr. 321-22). In actuality, however, as reflected by the parties' inventories of the contents of the 63 personnel files Warren brought to the courthouse on the last day of trial, many of the files were deficient of these materials, most notably those of officers who had served during Chief Harter's administration. (R. 878-1063, 1242-1630; PX 18, 25; DX 1). During the transition period between chiefs, the chief's office and desk were unsecured. (1 Supp. Tr. 120). Approximately three months after Warren became chief, the Kemah mayor and three police officers informed him that other Kemah officers had entered the office and destroyed "stuff out of their own files." (*Id.*). There is no evidence of the identities those who allegedly had destroyed

documents that the files at least in theory should have contained. Thus, while it is true that at docket call Helfand inadvertently misstated the extent to which the files of Harter era officers could not be accounted for, his comments in this regard could not have amounted to a material misrepresentation, let alone a misstatement capable of preventing Tollett from having a fair trial.

E. The Trial.

The case was tried to a jury between March 10 and 13, 1998. Assistant Police Chief Pete Muñoz attended as the City's trial representative. During Tollett's tenure Muñoz had served as a corporal and a field training officer; he did not then have access to police personnel files. (9 Tr. 320, 356, 381-82; 1 Supp. Tr. 81). The custodian of the files at that time was Chief Harter, whom the City had relieved of duties on October 1, 1995, even before Tollett filed suit. (9 Tr. 356; 10 Tr. 444-46; 1 Supp. Tr. 31-32; DX 1). Since the parties could not locate Harter during the *Tollett* litigation, he was unavailable to testify at trial. (9 Tr. 356-57). Harter's second-in-command, Alonso Swinney had resigned in November 1996. (10 Tr. 450; R. 911). The Kemah chief of police at the time of trial, Keith Warren, had not been a city employee when Tollett served. (1 Supp. Tr. 110). Thus, Muñoz was the highest ranking police officer still in the City's employment who had witnessed Tollett's job performance.[4]

On March 10, 1998, during presentation of the parties' motions in limine, Tollett reurged her motion for sanctions,

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records, as no names were ever mentioned. (*Id.*, at 122). Nor does the record of the sanctions hearing indicate exactly what was destroyed or why.

[4] Muñoz was not, however, the City's custodian of police personnel records – Chief Warren was – and as the trial record abundantly shows Muñoz was not the person best qualified to testify about the contents of those files, particularly those compiled during the time of Tollett's employment when Muñoz had no access to any of them.

which the Court carried with the case. (8 Tr. 31). In the discussion that followed, Tollett's counsel argued that Pierce's affidavit certifying no records of similarly situated officers "modified what we asked for." (*Id.*, at 32). Mr. Helfand reminded the Court that during the October 6 docket call, the Court itself had indicated that a no-records affidavit of this sort "would suffice." The District Judge replied: "Well, that would suffice as far as the Court is concerned about the effort to comply [with the discovery order]. . . ." (*Id.*, at 33).

Apparently, the Court's greater concern at this point was the City's failure to have maintained complete records for all of its police officers – in the Court's mind a violation of state law relevant to the credibility of the City's witnesses. The Court would thus permit cross-examination on why such records had not been preserved. (*Id.*, at 33-36). The effect of this ruling was to put the City on trial as much for its faulty record-keeping as for its treatment of Tollett.

To the extent one reads Tollett's certiorari petition and the District Court's sanction order of October 2, 2000 as implying that Helfand had argued to the jury that the City had lost all of the personnel files of officers who had served under Chief Harter, any such implication is unfounded. During opening statement, Helfand commented only on the absence of *relevant* records of sex discrimination against Tollett:

> This lady has already admitted, and I think you will see in the evidence, there is nobody who is going to testify that decisions related to her were because she's a woman, no one. There are no documents, no memos to suggest that, nothing. . . .
>
> [I] will prove to you, and she will tell you, if she testifies consistent with her prior deposition testimony, no witnesses, no documents, absolutely nothing but her firmly held belief. And I don't mind for a second, and I will tell you

> this again later, I don't mind for a second that she thinks it, but that's not proof of it and she won't prove it to you, because she will tell you that there are no witnesses and no documents, that anything that happened to her because of the fact that she's a woman.

(8 Tr. 143-45).

> Now I've got to tell you, Chief Harter, he's not the chief anymore. He was a good cop. He was a lousy administrator. He didn't do the administrator work of his job very well, and his record keeping was dismal. This is a small police department, as Mr. Griffin correctly told you. Seven police officers worked here. Yeah, they have volunteers come in and out from time to time, but there are seven cops in the entire department. And Chief Harter did not keep very good records with respect to those individuals.
>
> But the records are not what this case is about, because there would be nothing in those records – and we have the records as they relate to Ms. Tollett, but there would be nothing in the records that would show that Ms. Tollett's treatment was because of the fact that she is a woman. And the fact that we may not have the records for somebody else has nothing to do with Ms. Tollett.

(8 Tr. 147-48).

During the trial itself, Helfand made other statements about various employee "records". In its October 2, 2000 sanction order, the District Court quoted some of these statements out of context to create the impression that Helfand, at one point in the trial, knowingly misrepresented the status of the City's police personnel files to the Court, and later, after the

Court threatened to send the FBI to City Hall, had dramatically confessed to having known the true state of the files all along. The Court's rendition of these events is as follows:

> [D]uring opening statements, attorney Helfand was confident in telling the jury that there were no documents or records that supported the plaintiff's case. When the Court threatened a criminal investigation, attorney Helfand again stated to the Court, "They don't have them." Later in the colloquy between the Court and attorney Helfand, he modified his statement to, "I don't have the records." Finally when the Court threatened to have federal authorities search the City's facilities for such records, attorney Helfand remarked to the Court, "I will have the Chief bring those records tomorrow."

(R. 1662).

For this Court to better understand the strength of the inferences the District Judge has drawn from Mr. Helfand's statements quoted above, it will be necessary here to reconstruct the actual context of each of these statements, paying close attention to how the term "records" was used each time and the particular context in which it was used.

During the trial, it was Muñoz in response to cross examination — rather than Helfand in response to the Court's threat of a criminal investigation — who first disclosed that the City had in fact been maintaining personnel files of its officers, including his own. Without hesitation, Muñoz also revealed he knew where the City had been keeping *those* files. (9 Tr. 320-21).[5]

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[5] Later in his testimony Muñoz clarified that he knew the City was maintaining the files of its "current officers"; he was unsure what remained of any of the files of officers who were no longer employed by the City when Warren became the chief. (9 Tr. 355-66).

The focus of cross-examination then shifted to an entirely different set of "records" – Muñoz's "field training records." These were records Muñoz had made of his observations of officers training under his supervision (Tollett being one). Regarding *these* records, Muñoz testified that he had made handwritten, contemporaneous notes of the dates and hours of Tollett's training sessions. Muñoz testified that he turned *these records* over to Captain Swinney, but they were not in the "employee file" produced by the City in the litigation. (9 Tr. 322-26, 336-37). *To this day Tollett's training records remain missing.*

When Muñoz later attempted to testify from memory about the number of hours per week Tollett customarily worked, the Court refused to allow it, stating:

> THE COURT: I'm not going to let him testify to those [recollections], because the Best Evidence Rule says his memory isn't worth zip unless he can establish and show where the records are and why they're not here before the Court.
>
> MR. HELFAND: I would like to make a record on this at some point, Judge.
>
> THE COURT: You certainly can. And I'm very close to asking that there be a criminal investigation involved in this situation, because it is totally outrageous that these people are violating state law and not maintaining records and then come in here and pretend that they don't know where other people's records are.
>
> MR. HELFAND: *Judge, they don't have them.* We've had this discussion with the Court before, and I don't disagree with what the Court is saying. It's clearly inappropriate.

> THE COURT: It is a violation of state law and it is a crime to destroy records when a lawsuit is implicated. It is against federal law to destroy records. The implication of all this – and if the jury was sitting over there and listening to him testify and he's on trial for his life, they wouldn't believe him, in my opinion, and they would put him in jail, because they know he's the man who created the records and they know that there are other men who helped maintain and create records and they know that those men should be here. This is a crime.
>
> MR. HELFAND: Judge, I'm not disagreeing with the Court that it may be a crime. I don't know. All I'm saying – I don't disagree, Judge. *I don't have the records.*

(9 Tr. 349-50) (emphasis added).

Viewed in proper context the "records" Helfand was referring to here were Muñoz's *time* records – records which to this day remain missing. Thus, Helfand's statements to the Court that "they" – *i.e.*, the City officials – "don't have *them*", meaning time records, and that "I don't have them", meaning time records, were all literally true.

In the next passage, the District Judge referred to "these records" as among a wider domain of "records" that he believed his one-line order had commanded the City to produce: "[W]hat I ordered was the production of these records, and they have not been produced." (*Id.*, at 350). The Court then confronted Muñoz with his earlier testimony that he knew where City was keeping its police employee files – again, a different set of "records." The Court proclaimed: "It is a falsehood, a misrepresentation, to tell the Court you have no records and then sit up here on the witness stand and say, 'I know where they're stored.'" (9 Tr. 351). Muñoz again confirmed: "I know where the *employee files* are today." (*Id.*, at 351) (emphasis added). This revelation

provoked Judge Hoyt to command the City to bring *those records* to the courtroom:

> THE COURT: Well, you go tell your client –
>
> MR. HELFAND: My client has been told numerous times –
>
> THE COURT: – I want those records here.
>
> MR. HELFAND: Judge, *I don't haven't* [sic] *those records.*"
>
> THE COURT: Have those records here tomorrow morning or you don't come back. Whoever has got them, I want them and I want them here at the courthouse and I want to look at them. And if I determine that there has been some impropriety, I am going to ask the FBI to go over there and turn that office upside down and put everybody in jail that belongs to be there.
>
> MR. HELFAND: And, Your Honor, so we understand, so we can comply, is the Court instructing that the records of officers from that time period –
>
> THE COURT: I want every personnel record of every police officer during the relevant period of time. And I better find some records.

(*Id.*, at 352-53). The Court clarified the "relevant time" as 1993, 1994, and 1995. (*Id.*, at 353-54). Helfand at this point, rather than "confessing" to having known all along of the existence of these files, continued to express doubt about whether the City really had preserved any employee files kept during the Harter administration. (9 Tr. 355).

On the following morning, March 11, 1998, Chief Warren delivered to the Court *all* of the police personnel files then in the City's custody, including those of officers who served before 1993 or after 1995. (10 Tr. 458-64).[6] Tollett then moved for a mistrial and a continuance to review the files. (10 Tr. 470). Overruling these motions, the Court announced that Tollett would be afforded an opportunity to review the files after trial and further advised that if the files were then found to contain any probative evidence, the Court would consider it as a basis both for a new trial, if Tollett then desired one, and for enhancing sanctions yet to be imposed. (10 Tr. 471).

In the meantime, as a trial sanction the Court forbade Helfand from arguing to the jury that the City had in fact kept the personnel records of other officers. Instead, the Court instructed the jury – and permitted Tollett's counsel to argue in closing, as he strenuously did – that the jury could infer from the City's failure to produce the employment files of its other officers that such records contained evidence unfavorable to the City's position. (10 Tr. 465-79, 534, 550, 561, 567-69, 602; R. 746).

On March 13, 1998, the jury refused to find that the City had discriminated against Tollett in violation of Title VII. (R. 738-39). The Court accordingly entered a take-nothing judgment for the City on March 20, 1998. (R. 754).

F. Tollett's Rule 59 Motion for New Trial.

On March 30, 1998, Tollett moved for a new trial under FED. R. CIV. P. 59 citing two grounds: (1) some of the "newly-discovered evidence" in the files could have affected the outcome of the trial, and (2) *the alleged misstatements at issue in this proceeding by Helfand and Muñoz constituted a fraud on the court.* See Respondents' Appendix, Ex. A. *The Court*

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[6] See the inventories summarizing the files which Tollett filed in connection with the first appeal, showing that Chief Warren produced files of some 63 employees consisting of 4,874 pages in all. (R. 1017-39, 1057-63, 1242-1630; PX 25; DX 1).

denied this motion without explanation on May 18, 1998. (R. 856).

G. *Tollett I*: The First Appeal.

On June 12, 1998, Tollett appealed from the denial of her motion for new trial. (R. 868). On July 1, the City cross-appealed from the $5,000 sanction order (R. 870). In her appellant's brief in *Tollett I*, Tollett challenged the District Court's refusal to grant her a new trial on the ground of fraud. Although this ground, as noted above, had been raised in Tollett's Rule 59 motion for new trial, on appeal she raised it solely in connection with a second point of error that complained of the District Court's refusal to grant her relief from the judgment under Rule 60(b)(3). (R. 1073-76, 1082-83). Tollett, however, had not yet filed a Rule 60(b) motion below. Thus, in *Tollett I* the Fifth Circuit considered Tollett's second point of error premature. *See Tollett v. City of Kemah*, No. 98-20547, at p. 4 (5th Cir. September 13, 1999) (R. 1152).

In support of her appeal, Tollett had supplemented the appellate record with summaries and voluminous excerpts of the 63 employee files produced by Chief Warren on the last day of trial. (R. 880-1063). The *Tollett I* Court, after reviewing those records, stated: "*Tollett has not directed us to, nor have we found, any evidence that would have changed the outcome of the trial.*" *Id.* (emphasis added). Accordingly, the Court affirmed the original take-nothing judgment for the City. (*Id.*).

H. Proceedings on Remand.

On October 19, 1999, the District Court entered an order setting a hearing on December 6 and stating that "[o]n remand of this case, the Court is required to determine reasonable sanctions for the conduct of the defendants [sic] and/or counsel in failing to comply with discovery request ordered by the Court." (R. 1156). At the December 6 hearing, the District Judge decided to set the matter for a full evidentiary hearing, having read *Tollett I* as "saying I need to make a complete record, it

seems to me, and then determine *whether* sanctions should be entered or not." (12 Tr. 9) (emphasis added). Setting the tone for what was then to follow, Judge Hoyt castigated the City's counsel for their successful pursuit of the City's meritorious cross-appeal:

> I do not intend to walk away from this, because I'm insulted. I'm angry by the fact that this case would go up on a simple $5,000 award that was designed to ameliorate Ms. Tollett's problem and counsel's anguish over not getting discovery that seems to me to bear substantially up on the issue of whether or not the trial itself – the entirety of the trial was circumvented. . . . I had hoped that this would have gone away; and I was disappointed that the appeal was taken, not so much, I suppose, by [Tollett's counsel] Mr. Griffin, who wanted terribly to set this case aside, I suppose, and for it to come back, but on the sanctions part. That part should have walked away. It should have been dealt with that day.

(12 Tr. 14-15).[7]

On January 12, 2002, Tollett filed what she styled an "amended motion for sanctions," requesting monetary sanctions under FED. R. CIV. P. 11 and 37 and a new trial under FED. R. CIV. P. 60(b)(2) and (3). See Respondents' Appendix, Ex. B. Tollett's fraud-on-the-court argument supporting her request for a new trial under Rule 60(b)(3) was a rehash of the same fraud-

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[7] Even before the sanctions hearing, the Court's view of the course Helfand should have followed was as follows: "Mr. Helfand should have said, look, you know, this thing is very touchy. It has criminal implications here. I have lied to the Judge. I have cheated in this process and I should back off *and I should get my client to back off with me* or pay the price for my client having done this." (12 Tr. 13) (emphasis added).

on-the-court argument the District Court had already considered, and rejected, in denying Tollett's Rule 59 motion for new trial in May 1998.

In addition, although Tollett maintains in her petition for certiorari that in her renewed motion for new trial, she moved for a new trial under not only Rule 60(b)(2) and 60(b)(3) *but also under the residual clause of Rule 60(b)*. However, a fair reading of the preamble, body, and prayer of that motion will reveal that Tollett did not move for a new trial under the residual clause. Only in a footnote of that motion did Tollett refer to a court's power to set aside a judgment in an independent action for "fraud upon the court." But even there she failed to request the Court to conduct an independent action for the purposes of obtaining relief from the judgment. See Respondents' App. B.

On January 14, 2000, the Court scheduled a hearing to "determine *whether* sanctions should be imposed and, if so, against whom." (R. 1189-90). Five persons were commanded to appear – Helfand, Warren, Pierce, Muñoz, and Ms. Rachel Ziolkowski (a lawyer associate of Helfand's). All were ordered to come "prepared to give testimony concerning personnel records kept by the City of Kemah in light of the Court's pretrial orders [sic] to provide those records to the plaintiff and her counsel." (*Id.*).

On March 7 and 8, 2000, the District Court held an evidentiary hearing on Tollett's amended motion for sanctions. At the outset of the hearing the Court stated that it did not consider the evidentiary hearing applicable to Tollett's Rule 60(b) motion for new trial, since the Court viewed that motion as sufficiently addressed by the documents and court papers already on file. (1 Supp. Tr. 4). In this regard the Court stated:

> All right. I recognize, Mr. Griffin, that you have raised — in addition to the question of your motion, should I say, for sanctions and/or supplemental motion or amended motion, let's call it — in addition to that, you have raised a

> basis, at least in your motion — let's see if it is contained — yes, in that same motion for amended sanctions, you have raised a 60(b) question and whether or not that should apply. And I believe that the parties — and I say parties meaning the City of Kemah as well as you — have adequately addressed that in the documents and papers. *So, I am not going to focus on that aspect of your motion from an evidentiary perspective.*

Id. (emphasis added). When then asked by the Court if the parties had any objection to this approach, Tollett's counsel stated he had none. *Id.*

REASONS FOR DENYING THE WRIT

On October 2, 2000, the District Court implicitly denied Tollett's Rule 60(b) motion for new trial. In *Tollett II*, the Fifth Circuit affirmed this ruling. Tollett's petition for certiorari is confined to those rulings of the lower courts. Tollett has not challenged the Fifth Circuit's reversal of the inherent power sanction award against the City and Helfand, and she has not challenged the Fifth Circuit's reversal of the factual findings made by the District Court in support of that sanction.

A. The Mandate Rule Bars Tollett's Rule 60(b) Motion.

Tollett's first two points of error appear to be shades and phases of the same contention that the Fifth Circuit, in *Tollett II*,

> denied Tollett her right to bring a meritorious claim for relief under the savings clause of Rule 60(b), "fraud on the court", and denied the district court its inherent right to raise or review that claim. The panel failed to recognize that at the hearing on sanctions following remand, the district court properly considered not only the

> mandate from the panel, but also the claim of fraud on the court, and therefore the district court's findings and order did not exceed the scope of the mandate.

Petition, at p.8.

Before turning to the merits of this argument, Respondents must first rebut the two misstatements of record which are built into it: First, as noted above, Tollett's motion for new trial at issue is not an independent action under the residual clause of Rule 60(b). The only subsections of Rule 60(b) on which Tollett moved for relief, in the preamble, body, and prayer of that motion, are Rules 60(b)(2) and 60(b)(3), which the Court of Appeals correctly held to be time-barred. *See* App. B.

Second, Tollett has mischaracterized the nature of the March 2000 sanctions hearing by treating it as if it were an independent action under the residual clause of Rule 60(b). At no time before or during that hearing did the District Judge take the view that the matter before him was an independent action to set aside the judgment. *To the contrary, on March 7, 2000, at the outset of the sanctions hearing, the District Judge stated expressly on the record that he did not consider the evidentiary hearing to be applicable to Tollett's Rule 60(b) motion for new trial, since the Court viewed that motion as sufficiently addressed by the briefing and documents already on file.* (1 Supp. Tr. 4).

Accordingly, contrary to Tollett's argument on certiorari, the Fifth Circuit did not "deny Tollett her right to bring a meritorious claim for relief under the savings clause of Rule 60(b)" — for she did not bring any such claim. Nor did the Fifth Circuit deny the District Court "its inherent right to raise or review" such a claim — for the District Court made it absolutely clear that the evidentiary hearing in March 2000 was held only to determine what kind of sanction to impose, if any, and not to decide Tollett's motion for new trial.

Finally, Tollett's argument that the mandate rule does not bar her Rule 60(b) motion, whatever its basis, is also unavailing. "[R]elitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom." *Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J., dissenting); 11 Wright, Miller, & Kane, FED. PRAC. & PROC. 2d § 2863, p. 340 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment"); *Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir 1995) ("Rule 60(b) does not license a party to relitigate, whether via motion *or independent action*, any issues that were made or open to litigation in the former action where he had a fair opportunity to make his claim or defense.") (emphasis added; internal quotations deleted).

As discussed above, after the original judgment in this case was entered, Tollett moved for a new trial under Rule 59 on the grounds of fraud on the court and newly discovered evidence. The District Court denied Tollett's Rule 59 motion. Accordingly, subsumed in the original judgment is the District Court's refusal to set that judgment aside on the ground of fraud, and the mandate in *Tollett I* did not authorize the District Court to relitigate that same question under the guise of a Rule 60(b) motion. But Tollett's Rule 60(b) motion attempts to do just that — it is a rehash of her Rule 59 motion which the District Court had already denied, a ruling Tollett could have appealed to the Fifth Circuit in *Tollett I*. Rule 60(b) is not an exception to the doctrine of res judicata once the matter has, as it was in this case, been fully and fairly litigated in a previous motion for new trial.

For this reason, Tollett's reliance on *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17 (1976), is misplaced. It holds merely that a Rule 60(b) motion may be filed in the district court, even after the judgment has been affirmed on appeal, but *only where the movant seeks relief from the judgment based on information not before the district court when it ruled initially. Id.*, at 18-19. Tollett's Rule 60(b) motion was based on precisely the same information she presented to the District

Court in her Rule 59 motion, and the matter was thus includable in the *Tollett I* appeal. *See Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 & n.1 (3d Cir. 1982) (distinguishing *Standard Oil* and holding that "[t]he district court is without jurisdiction to alter the mandate of this court on the basis of matters included *or includable* in defendants' prior appeal") (emphasis added).

B. Tollett's Rule 60(b)(2) & (3) Motions Are Time-Barred.

Alternatively, as the *Tollett II* Court further held, *assuming arguendo* the grant of a new trial would not have exceeded the *Tollett I* mandate, Tollett's Rule 60(b) motion at issue here, predicated as it was on Rules 60(b)(2) and (3), needed to be filed "not more than one year after the judgment ... was entered." FED. R. CIV. P. 60(b). Since it was filed 24 months after the original judgment, it was, as *Tollett II* correctly holds, untimely. In her petition for certiorari, Tollett does not complain of any error in this alternative ground.

C. In Any Event, The District Court Did Not Abuse Its Discretion In Denying Tollett's Motion For New Trial.

1. Waiver.

As noted above, Tollett's Rule 60(b) motion for new trial does not purport to be an independent action under the residual clause of Rule 60(b). The only subsections of Rule 60(b) on which Tollett moved for relief, both in the preamble of her motion and the prayer, are Rules 60(b)(2) and 60(b)(3), which the Court of Appeals correctly held to be time-barred. *See* Respondents' Ex. B. During the March 7-8 sanctions hearing, the District Court correctly decided that it would be able to decide Tollett's Rule 60(b) motion on the written motion papers without the need to conduct any trial on the merits of a claim of fraud on the court, and Tollett did not object to this approach.

2. No Fraud On The Court Shown.

Furthermore, even if Tollett had properly preserved her present argument about the denial of relief under Rule 60(b)'s residual clause, the District Court can hardly be said to have abused its discretion in denying such relief. *See Switzer v. Coan*, 261 F.3d 985, 988 (10th Cir.2001) (appellate court reviews disposition of action for fraud upon the court under abuse-of-discretion standard).

Fraud of the type necessary to sustain an independent action attacking the finality of a judgment — "fraud upon the court" — is far narrower in scope than that sufficient for relief by timely motion under Rule 60(b)(3). *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-46 (1944); *First Nat. Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996); *Porter v. Chicago School Reform Bd.*, 187 F.R.D. 563, 565-66 (N.D. Ill. 1999); 12 MOORE'S FEDERAL PRACTICE 3d, at § 60.21[4]. "[F]ar more than an injury to an individual litigant," it "embraces 'that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication.'" *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir.1994) (quoting *Kupferman v. Consol. Research and Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir.1972)); *see also Wilson v. John-Mansville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989).[8]

This Court has held that an independent action under the residual clause must, "if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting

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[8] The only similarity between the standard for establishing fraud under Rule 60(b)(3) and fraud on the court is that both species of fraud must be proved by clear and convincing evidence. 12 MOORE'S FEDERAL PRACTICE § 60.21[4][b] (3d ed. 1999).

Hazel-Atlas Glass Co., 322 U.S. at 244). Courts and authorities agree that "fraud upon the court" must be narrowly construed so that this "otherwise nebulous concept" does not "overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule." *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir.1982) (citing numerous cases). Because the power to vacate a judgment for fraud upon the court is so free from procedural limitations, it "is limited to fraud that 'seriously' affects the integrity of the normal process of adjudication," 12 Moore, *Moore's Federal Practice* ¶ 60.21[4][a] (3d ed.1999). For example, fraud upon the court includes fraud by bribing a judge, or tampering with a jury, or fraud by an officer of the court, including an attorney. *See id.* ¶¶ 60.21[4][a], [b].

Fraud between parties, therefore, "is not fraud on [the] court" even if it involves "[p]erjury by a party or witness." *Id.* ¶¶ 60.21[4][c]; *see also, e.g., United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 66, 25 L.Ed. 93 (1878) ("The doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence"); *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir.1995) ("perjury alone, absent allegation of involvement by an officer of the court ... has never been sufficient [to constitute fraud upon the court justifying collateral attack]") (citing numerous cases).

Moreover, as the Tenth Circuit has stated:

> "fraud on the court," whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing — what can properly be characterized as a deliberate scheme to defraud

> — before relief from a final judgment is appropriate.... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself a sufficient basis for setting aside a judgment under the guise of "fraud on the court."

Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir.1995).

Since Tollett's allegations do not begin to approach the demanding standard for setting aside a judgment under the residual clause of Rule 60(b), the District Court could not have abused its discretion denying such relief. Tollett's contention is simply: (1) the City Secretary signed an affidavit which is literally true but which, according to Tollet, was "misleading" in some undefined respect; (2) the City failed to timely produce its existent employee files in discovery — files which the Fifth Circuit in *Tollett I* reviewed and found to be legally irrelevant; (3) the City's counsel, Helfand, overstated at docket call that the City was unable to account for *any* of its police employee files (when in fact the City did have possession of numerous irrelevant files and could not account for numerous others which were then and remain today lost); (4) Helfand truthfully argued to the jury that Tollett can point to no documents establishing that she is a victim of sex discrimination, an argument which even today remains true; and (5) training records which have never surfaced in the litigation remain unaccounted for.

It is well established that allegations of non-disclosure of documents during pretrial discovery do not constitute grounds for an independent action under Rule 60(b). *First Nat'l Bank*, 96 F.3d at 1573; *Wilson*, 873 F.2d at 872; *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); 12 MOORE'S FEDERAL PRACTICE 3d, at § 60.21[4][c].[9] Nor do allegations of perjury by a witness.

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[9] See also *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d

Hazel-Atlas, 322 U.S. at 245.[10] Thus, Tollett's attempt to bootstrap a discovery dispute into a fraud claim is unavailing.

3. Futility Of A New Trial.

As an "additional requirement," the party seeking relief under the residual clause of Rule 60(b) must prove that the evidence in question "would have changed the outcome of the original action." *United States v. Beggerly*, 524 U.S. at 47 n.4 (citing *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)). That is, to merit Rule 60(b) relief of any kind, the movant must make a threshold showing that she has a meritorious claim or defense — "that vacating the judgment will not be an empty exercise." 12 MOORE'S FEDERAL PRACTICE 3d § 60.24[1], at 60-77 (quoting *Local 59 v. Superline Transport Co.*, 953 F.2d 17, 20 (1st Cir. 1992)).

Accordingly, the District Court could not have abused its discretion in denying such relief because, as a matter of law, Tollett cannot prevail on the merits of her Title VII claim. Any retrial of this case would be futile for at least the following two reasons.

First, Tollett was not an "employee" within the meaning of Title VII, 42 U.S.C. §§ 2000e(f). Her volunteer status was part-time, without pay or benefits. *See Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir.1990) (compensation is an

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1115, 1118 (6th Cir.1976); *Traveler's Indemnity Co. v. Gore*, 761 F.2d 1549, 1551-52 (11th Cir.1985) (failure to disclose documents during discovery).

[10] *See also Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir.1982) ("[p]erjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible"), *cert. denied*, 459 U.S. 1128 (1983);*Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988) (after discovered evidence of perjury does not support finding of fraud on the court), *rev'd in part on other grounds*, 869 F.2d 688 (2d Cir.1989).

"essential condition to the existence of an employer-employee relationship"); *Tadros v. Coleman*, 898 F.2d 10, 11 (2d Cir.1990) (upholding the dismissal of Title VII claims of volunteer member of college faculty; since defendant did not both control his work *and pay him*, plaintiff was not an employee). She had unilateral power to decide when or whether to leave for health reasons, and it was she who dictated when, if ever, she would return.

Second, even if Tollett could be regarded a prospective "employee" within the meaning of Title VII when she returned from her ten-month leave of absence to have a baby, the City did not take any "ultimate employment action" cognizable under Title VII. Title VII jurisprudence makes an important distinction between (1) "ultimate employment decisions" and (2) mere "interlocutory or mediate decisions" which have no immediate effect upon employment conditions, but which might lead to an ultimate decision. The former can be actionable under Title VII, while the latter cannot, regardless of motivation. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995) (per curiam); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S 892 (1981). *See also Burlington Indus., Inc. v. Ellerth*, 524, U.S. 742, 761 (1998) (noting, in a sexual harassment case, that "a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

"'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern*, 104 F.3d at 707 (citations omitted). On the other hand, changing an employee's work schedule, hours, or increasing an employee's workload are merely administrative decisions and do not constitute the type of ultimate employment decisions contemplated by Title VII. *See Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir.1998), *cert. denied sub nom. Benningfield v. Nuchia*, 526 U.S. 1065 (1999). Other examples of non-actionable, interlocutory decisions include purely lateral transfers. *See Burger v. Central Apartment Management, Inc.*,

168 F.3d 875, 879 (5th Cir.1999). "A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." *Id.* (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir.1996) (Posner, J.)).

In the present case, when Tollett returned to work after a ten-month self-imposed absence, two of her supervisors allegedly expected her to resume field training. Although it is disputed whether Tollett had already completed her field training when she left her job due to her pregnancy, that dispute is immaterial. Chief Harter, the official decisionmaker, never advised her that she would be required to re-train in order to resume her duties as a reservist, and she never mentioned to Chief Harter that her supervisors insisted that she re-train. Thus, there is no proof that the City — the Title VII "employer" — took any position with respect to her training status.

Furthermore, and more fundamentally, regardless of whether Tollett was required to re-train upon returning to work, such a requirement – that an employee undergo *more* training than what may be required for others – does not by itself tend to affect the terms and conditions of employment in a way that violates Title VII. *Cf. Shackelford v. DeLoitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999) (holding that *denial* of training that does not tend to result in a change of employment status, benefits or responsibilities is not an adverse employment action covered by Title VII). No evidence exists to show that Tollett would have received any tangible employment benefit if the City had deemed her training complete. For even as a *fully trained* reserve officer, Tollett's pay and benefits would have remained the same: zero. Nor is there any evidence of any qualitative difference between Tollett's responsibilities as a trainee and what her responsibilities would have been as a reservist who had completed her training. Although in her brief she labels reservist trainees as "probationary employees," thereby suggesting the existence of some material distinction in status between trainees and non-trainees, there is no basis in the record for it.

4. Untimeliness.

Although an independent action under the residual clause of Rule 60(b) is not subject to the absolute one-year time limit imposed on Rule 60(b)(3) fraud motions, all Rule 60(b) motions, even those filed under the residual clause, must be "made within reasonable time." FED. R. CIV. P. 60(b). Tollett, of course, had ample time to submit a Rule 60(b)(3) motion before the one-year deadline since all of the evidence on which she based her present fraud claim was available to her at the time of trial.

It is fundamental that equity will not grant relief from a judgment if the complaining party, by exercising proper diligence, would have had an adequate remedy at law. As discussed above, Tollett's Rule 60(b) motion is a rehash of the Rule 59 motion she timely filed in 1998, and which the District Court and the Fifth Circuit rejected. If it is Tollett's position that her Rule 60(b) motion presents new arguments not addressed in her Rule 59 motion, she certainly made no effort to explain why she could not have presented them in a *timely* Rule 60(b)(3) motion. Accordingly, having failed to take advantage of the adequate remedy at law offered by Rule 60(b)(3), Tollett may not now seek relief in equity under the residual clause. *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662-63 (2d Cir.1997); *Wallace v. United States*, 142 F.2d 240, 244 (2nd Cir.) ("[o]bviously it cannot have been intended that what may be done within six months, pursuant to the body of Rule 60(b) may also be done thereafter, under the exception contained in its last sentence") (referring to predecessor to current Rule), *cert. denied*, 323 U.S. 712 (1944).

* * * * *

CONCLUSION

Accordingly, this Court should deny Tollett's petition for certiorari.

Respectfully submitted,

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SOUTHERN DISTRICT
OF TEXAS

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 30 1998
Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-96-3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S,
MOTION FOR NEW TRIAL

Plaintiff, Sandy G. Tollett, files this her Motion for New Trial consistent with the dictates of Rule 59, Federal Rules of Civil Procedure and Rule 4, Federal Rules of Appellate Procedure. Plaintiff would show unto the Court as follows:

GROUNDS FOR NEW TRIAL

1) Suppression of Evidence: A new trial in this should be granted in light of the proven suppression of evidence in this matter. If the Court remembers, the Plaintiff has previously filed a motion to compel and a motion for sanctions. The Defendant's counsel has failed to file a written response to any of the filings, but previously stated orally to the Court that no documents exist, The Defendant's counsel has also stated:

A. In opening statement, the Defendant's counsel asserted to the jury that no files existed for any of the other officers, and that the only file that existed was the file of the Plaintiff.

B. When the Defendant's witness was cross-examined on the point of no files existing, the witness feigned ignorance, stated that he had no personal knowledge, and informed the Court that the files were destroyed by former Chief Hartner. When this counsel questioned as to the Defendant's counsel statements made in opening statement, an objection was stated, "I didn't make that statement," and a speaking objection followed, "those files have nothing to do with discrimination,"

C. When the Court pressed, outside the presence of the jury, as to the existence of the employment files, the Defendant's counsel took a number of positions; i) that the files didn't exist; ii) that the Court had somehow modified its order; iii) that it would produce only the files from a certain period (after 1995) (period related to after former Chief Hartner had gone from the Department). This last statement was made by the Defendant's witness and in essence was the perjury of the witness Munoz. The defense lawyer at no point in time sought to correct the record, supported the contention of the Defendant, no matter which way the wind blew and participated fully in muddling the record before the jury, and/or in any presentation to the Court. It wasn't until the Court threatened counsel with the intervention of the Federal Bureau of Investigation did he agree to produce the files. The Court's position was taken on March 11, 1998. The next day, March 12, 1998, the Defendant's counsel showed up with files of employees who were full-time paid and full-time non-paid officers. At no time during this sad rendition of total disobedience of the Court's order did the Plaintiff have access to the comparable files of other officers.

2) A Fair Trial Was Denied by Virtue of the Trial Counsel's Support of Perjury and the Intentional Misleading of the Court. The absence of the relevant and ordered

materials worked to deprive the Plaintiff of a fair trial. First, all available ordered information was not produced to the Plaintiff. Secondly, the Plaintiff's lawyer was required to try its case on a fiction and not allowed to bring out that counsel/City of Kemah actually lied about the documents not existing. The jury was allowed to assume that counsel for the Defendant was honorable and/or the City of Kemah was honorable and could be trusted.

The Fifth Circuit in defining the standard of review in the grant or denial of motions for new trials explained, in Massey v. Gulf Oil Corp., 508 F.2d 92, 94 (1975), the district court's role thusly: "[i]n this circuit the ruling of a trial judge in either granting or denying a motion for new trial is reviewable under an abuse of discretion standard. United States for use of Weyerhaeuser Co. v. Bacon Construction Co., 430 F.2d 420 (CA5, 1970) ; Telfair v. Zim Israel Navigation Co., 428 F.2d 127 (CA5, 1970), cert. denied, 400 U.S. 1009, 91 S.Ct. 568, 27 L.Ed.2d 6232 (1971); Willitt v. Purvis, 276 F.2d 129 (CA5 1960); Marsh v. Illinois Central R. Co., 175 F.2d 498 (CA5 1949). Although the trial judge's discretion is broad with respect to the granting of a new trial, the granting of a new trial constitutes reversible error under certain circumstances. See 6A Moore's Federal Practice 59.08[5], at 59-162-63."

The perjured testimony, misconduct of trial counsel and the suppression of evidence worked to deprive the Plaintiff of a fair trial. In light of the district court's findings in the grant of sanctions, a new trial should be granted in this matter, particularly in light of the prejudice associated with the misconduct of the attorney. Angelo v. Armstrong World Industries, Inc., 11 F.3d 957, 962 (10th Cir. 1993). Plaintiff did not wait until the verdict was rendered in this matter. Counsel for Plaintiff requested a continuance to review the documents, ask that a mistrial be granted in light of the late production of the documents, and informed the Court that he thought that the current status of the record provided ample opportunity for the jury to be confused and render an improper verdict for the Defendant. The jury never knew of the documents' existence/availability. The jury never knew

that the statements with respect to the former Chief Hartner were an actual lie. And finally, the jury never knew that Officer Munoz's statements as to his not having anything to do with the files were actual misstatements of testimony presented to the Court (outside the jury's presence) and testimony taken by the Court from others brought forward at the Court's request.

3) The Jury Disregarded the Court's Instruction; When the jury read its verdict, it also read a personal note to the City of Kemah. The personal note criticized the City of Kemah for not keeping records. The sad irony of this note is the position that Plaintiff found herself in.

First, Plaintiff discovered that the City, and its representatives1 actually lied about the documents.

Secondly, the Plaintiff had to proceed forward with trial, request a continuance or ask for a mistrial.

Thirdly, once, the Plaintiff requested a continuance and/or mistrial, and the same denied, the Defendant could lie and wait for a verdict. First, the jury could assume that the Defendant, its current representatives and its lawyer were innocent bystanders and not part of the old regime, thus the personal note. In fact, when the Court questioned Officer Swinney about the records, not before the jury, Officer Swinney admitted that the records were tendered to him by Chief Hartner and that he had stored the files in the file cabinet.

4) The newly discovered evidence is material and of such a character that a new trial with such evidence will probably produce a different result. In Marshall's U.S. Auto Supply v. Cashman, "{a} motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and

must show that it is of such a character that on a new trial such evidence will probably produce a different result. Prisament v. United States, 5 Cir., 96 F.2d 865." Marshall at 111 F.2d 140, 142.

Currently, the Plaintiff is reviewing the documents in question. In fact, since the trial, one of Plaintiff's counsel (Terry Weir) has reviewed the employee files once and on the date of this motion is scheduled to review the documents a second time (March 30, 1998). The employee files to this date have not been copied and provided to the Plaintiff. Plaintiff has filed with the Court a Motion providing for the security of the sealed records, for the copying of the employee files at the Defendant's costs and the ultimate production of the documents.

Evidence is not cumulative: The employees' files are clearly not cumulative in light of the fact they were never produced. The defendant's stated position, before the Court and the jury, were the documents didn't exist. The statements of defense counsel serve as a representative of the City's position. Since the grant of the Motion for Sanction, the Defendant has sought to file a response to the Motion for Sanction (untimely under the Local Rules and Federal Rules of Civil Procedure) feigning ignorance and. a misunderstanding of the Court's previous rulings. It is impossible for the materials to represent cumulative evidence when the Defendant's agents, employees, assigns and attorneys were all part of the suppression of the evidence in this case.

Evidence is material: First, the importance of employment files cannot be understated. Thoughtful study of the employment files would reveal:

- who and what persons were comparable in context of time with the department, training, promotion, and field service.

- the information of comparable officers would allow the Plaintiff to engage in adequate discovery and the taking of

depositions to determine how other officers were assigned their hours for field service training.

- the employment files of other officers will reveal the employment history, evaluations, and how those other officers were treated. A material issue in the trial related to the unsigned employment evaluations of police officers, other than the Plaintiff. The question still exists A) whether other employment evaluations were in existence, B) whether the evaluations were signed by the employees. More importantly, the Plaintiff would be able to call to trial witnesses with knowledge of relevant information rather than moving through an examination without any knowledge of relevant impeachment evidence available.

Information that has been to date from review is found under the Exhibit "1," wherein the affidavit of Terry Weir is attached.

CONCLUSION

Clearly, the motion for new trial should be granted in light of "a miscarriage of justice would result if the verdict were to stand." This is particularly true in light of the suppressed evidence, the perjured testimony and the misstatement of trial counsel. If the current factual history were to become the rule of practice in the Southern District, there exists no detriment to trial counsels and their clients in seeking a verdict by lying, hiding documents, ignoring the Court's order, challenging the Court as to the availability of documents. Sanctions of five thousand dollars and court costs do not work as a deterrent to the miscarriage of justice mentioned herein.

Dated 30 March, 1998

Respectfully submitted,

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UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED
MAR 30 1998
U.S. COURTS
SOUTHERN DISTRICT
OF TEXAS Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-96 –3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

ORDER

The Plaintiff's Motion for New Trial, is granted. DONE AT HOUSTON, TEXAS on this the ___ day of _____ 1998.

KENNETH HOYT
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED

JAN 12 2000

Michael N. Milby, Clerk

CIVIL ACTION NO. H-96-3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S, AMENDED MOTION FOR SANCTIONS

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United States District Court
Southern District of Texas
FILED

JAN 12 2000

Michael N. Milby, Clerk

CIVIL ACTION NO. H - 96 - 3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S AMENDED MOTION FOR SANCTIONS

Plaintiff files this her Amended Motion for Sanctions, pursuant to Rules 11 & 37, and under the dictates of Rule 60 (b) (2) (3) (fraud on the court). fn1 For good cause, the Plaintiff would show unto the Court as follows, to-wit:

Procedural History

1) This case was filed on September 26, 1996. The Plaintiff brought suit: contending that her employment with the Defendant City of Kemah was tainted by sexual animus that affected her relationship with her fellow employees, her training and ultimate recognition as a police Officer with the defendant City. Plaintiff's suit was brought under Title VII, 42 U.S.C. section 2000e.

On May 13, 1997, the Plaintiff filed a Motion to Compel full answers to her Request for the Production of Documents and First Set of Interrogatories, pursuant to Rule 37, Federal Rules of Civil Procedure. A response by the City of Kemah was filed on or about June 2, 1997. This Court granted the motion to compel on June 27, 1997 and ordered full and complete answers to the Plaintiff's First Set of Interrogatories and the production of relevant documents.

On October 9, 1997, the Plaintiff filed her Motion for Sanctions in that the Defendant refused to comply with the Court's order. The motion was carried along at the time of trial.

This matter was tried on March 10 - March 13, 1998.

Conduct of Counsel

2) The element of fraud was established early. At the docket call in this matter, counsel for the Defendant, William Helfand, held out the following:

I think we're simply at a point where the Plaintiff believes there are documents, and my client doesn't have documents (Tr. at Docket Call (unnumbered volume) at 7, lines 19-22) (emphasis added).

I represent a police department that when it went through a change of chiefs of police literally lost all the records that were under the prior administration/ And so, while I agree with Mr. Griffin that those records should exist in the management of a good city, good police department, they simply don't exist; and I don't have them to give (Tr. at Docket Call, id. at 7, line 25; 8, lines 1-6) (emphasis added).

Defense counsel then out-right misrepresented to this Court as he purported to read from the Plaintiff's Motion to Compel. The words of Defendant's counsel is more telling - "What they had asked for were - let me find the motion. The Plaintiff had asked for - - and the Court granted a motion to compel for

records and personnel files of employees who were - and I'm using quotes now because these were their words - similarly situated discriminated against because of a pregnant condition." (Tr. at Docket Call (unnumbered transcript) at 9, lines 21-25).

Defense counsel doesn't stop at that point though:

"The COURT: What records are, in fact, missing though? Are they just plain personnel files or what?

Mr. HELFAND: Yes, sir. That's the other problem. Practically all of the personnel FILES to the extent that they ever existed longer with the City of Kemah.
And there's some question, when I asked my clients, whether they were ever created and then were simply removed or destroyed or whether they simply weren't created.

There's some allegations that the former chief of police didn't keep records that he should have kept; and then there are other people who are of a camp that he kept records but then destroyed them or somehow removed them when he was removed from office (Tr. at Docket Call, id. at 9, lines 19-25; 10, lines 1-6) (emphasis added). fn2

After the docket call, the Defendant submitted the affidavit of the City Secretary seeking to adopt the similarly situated pregnant employee defense. After receipt at the affidavit, the undersigned forwarded a fax to defense counsel stating, "{w}ith respect to the Affidavit forwarded from the City Secretary's Office, it does not speak to the concerns of the Motion to Compel. You answer previously that certain document(s) existed. You also have produced some documents for Tollett - it is only logical that you/your client would have document(s) for other employees that form the basis for our request. To use code words, "similarly situated", ignored the Plaintiff requests." (facsimile attached to the original Motion for Sanction; filed 10/9/97; Doc. 34).

A. Trial Conduct. The Plaintiff's Motion for Sanction was carried along with the trial (Tr. at Vol. I at 31-33). The Court ordered that the question related to the existence or nonexistence of the employment files was properly the subject of cross-examination (Tr. at Vol. I at 33, lines 16-25; 34, lines 1-10). During the opening statement of defense counsel, the benefit to the defense with respect to the absent documents became clear;

Mr. Helfand;

I would submit to you it's the problem with discrimination cases. This lady has already admitted, and I think you will see in the evidence, there's nobody who is going to testify that decisions related to her were because she's a woman, no one. There are no documents , no memos that suggest that, nothing.

. . .

Two, I will prove to you, and she will tell you, if she testifies consistent with her prior deposition testimony, no witnesses, no documents, absolutely nothing, but her firmly held belief. And I don't mind for a second, and I will tell you again later, I don't mind for a second that she thinks it, but that's not proof of it and she won't prove it to you, because she will tell you there are no witnesses and no documents, that anything happened to her because of the fact that she's a woman.

She will not - - although her lawyer says she will, she cannot tell you, to the point that we can identify somebody, any man who is treated differently. Remember, her claim is that this happened because she's a woman. Oh, she will say, "There's a fellow named Charlie. I don't know his last name.

So. you can't find him, Bill. He's just named Charlie. And I think what happened to him was he went out and he got to come back, and I don't know whether it was the same as me." And I think when you hear that, you're going to see that's not evidence of a man being treated any differently.

(Tr. at Vol. I (opening statement of Defendant's counsel) at 144, lines 3-8, 23-25; 145, lines 1-16) (emphasis added)).

Later in the opening statement, defense counsel holds out that Plaintiff had her records, but the records for other officers simply didn't exist (Tr. at Vol. I at 147, lines 15-25; 148, lines 1-5). Defense counsel's theme would reverberate throughout the trial proceedings.

B. How fraud affected the examination of the witnesses.

As seen in the examination of Plaintiff: Defense counsel inquired to whether the Plaintiff had any evidence or documents showing that she was removed from the Field Training Program (Tr. at Vol. II at 239, lines 7-11). This form of examination was consistent with the defense counsel's posture that no documents existed to support the Plaintiff's cause.

In addition, the defendant's counsel inquired of the Plaintiff as to the name of another other officer that was accorded special privileges with respect to the officer's physical condition and not being required to go back in the training program. Plaintiff answered the question only with the first name of the officer because of the lack of documents. The documents were in the sole control of the Defendant and subject of the Plaintiff's discovery request (see examination at Tr. at Vol. II at 250, lines 21-25; 251, lines 1-2). The importance of this inquiry is clear: interrogatories submitted sought the name, addresses and telephone numbers of former officers. The document production supported the interrogatories in question. Documents were not produced. Defense counsel knew the answer would only be the first name of the officer and benefited from his disregard of the Court's order (Tr. at Vol. II at 255, lines 13-21 255, lines 16-21).

The examination of the City's chief witness (Munoz: This witness was the City's representative during the trial and his name was listed as the person providing the answers to the interrogatories the subject of the debate. The witness

provided that he certified that the files were not available, but claimed ignorance as to the files existence (Tr. at Vol. II at 317, lines 9-24). When the witness was asked about the City's lawyer's position that the only employment file that was available was the employment file of Plaintiff and that no other files were available, counsel (Bill Helfand) objected and stated, "I never said that." (Tr. at Vol. II at 320, lines 14-18). After the witness admitted that he had a personnel file (Tr. at Vol. II at 321, lines 12-25; 322, lines 12-25), the jury was removed by the Court.

When the jury returned Mr. Munoz affirmed that his file contained evaluations, psychological testing, time sheets, criminal history check documents, fingerprint cards and that all were required to be in an officer's file by the State of Texas (Tr. at Vol. II at 326, lines 22-25; 327, lines 1-25; 328, lines 12-15, 17-19).

After Munoz admitting to evaluating the Plaintiff, but not providing her a copy of any such undated evaluations and denied keeping the Plaintiff's time as her Field Training Officer (Tr. at Vol. II at 329, lines 1-8, 17-19; 330, lines 1-25; 335, lines 1-15), this Court understood the unlikely and highly unusual defense that was being taken. This Court then threatened a criminal investigation (Tr. at vol. II at 349, lines 21-25). Defense counsel then responded, "They don't have them" (emphasis added) (Tr. at vol. II at 350, lines 1-5). After defense counsel's statement, the Court again emphasized the federal and state law governing law enforcement officers' files (Tr. at Vol. II at 350, lines 6-25) . The defense lawyer then slightly modified his statement, "I records" (emphasis added). This Court then informed defense counsel that he would have the FBI go over and turn the police station upside down and put everyone in jail (Tr. at Vol. II at 353, lines 1-5).

The examination of the City Secretary, Kathy Pierce: This witness admitted that she possessed files for full-time police officers between years 1993-1996. The witness then "did not recall" whether she informed the court that Tollett's was the only employment file available. (Tr. at Vol. II at 408, Lines 18-

25; 415, lines 1-9; 416, lines 20-25; 417, lines 12-15). The admission by the witness begs the question: then why weren't the records produced when requested? In addition, the admission is totally contrary to the position taken by the defense lawyer before the jury and the statement that was made by defense counsel prior to her appearance in Court that "they don't have the records."

The witness also provided that she did not remember the request for information and that she did not recall being told to produce records (Tr. at Vol. II at 423, lines 1-6; 424, lines 1-16; 425, lines 1-6) . After this devastating admission takes place, defense counsel falls back on his similarly situated defense and contends that the Court only ordered only similarly situated officer's files. The Court rightly rejected the argument and then for the first time, without pulse, defense counsel utters, "I will have the Chief bring those records tomorrow." (Tr. at Vol. II at 431-433; see counsel's comments at 433, lines 1-14) + It should be noted that defense counsel, without conferring with any witness, city representative or his co-counsel, informed the Court that the records would be made available. The acts of counsel reveals knowledge on the lawyer's part in the fraud and the active use of fraud to prevail in the litigation.

History of the Case After Production of Records

3) Defense counsel was true to his word, the next morning defense counsel appeared with two file drawers of employment files, containing both full-time, non-paid and full-time, paid officers. When the files arrived, defense counsel expressed grave concerns with respect to the jury now having been misled and the condition of the record (Tr. at Vol. II at 438, lines 1-13). The Court, in response, requested the location of Captain Swinney and ordered that the witness appear as part of the Court's independent investigation with respect to the pending motion for sanctions.

Examination of Captain Swinney: Swinney Provided that he was the Assistant Chief at the time and was required to maintain records for non-paid officers, including the officer's time sheets (Tr. at Vol. III at 444, lines 1-18). Swinney also explained that if a person completed the field training program, he and the training officer would go the Chief and explain the successful completion (Tr. at Vol. III at 449, lines 1-11). -Swinney explained that if a Trainee failed the training process a note would be placed in the employee's file (Tr. at Vol. III at 454, lines 21-25; 455, lines 1-21). The witness affirmatively stated that no employment files were destroyed (Tr. at Vol. III at 450, lines 16-19; 452, lines 1-24; 454, lines 1-7; 456, lines 1-11)

Clearly, the witness revealed a willful disregard of the Court's order by defense counsel. More importantly, the testimony reveals that the counsel and his client were actively engaging in fraud on the court and jury in order to prevail in the litigation.

Testimony of Police Chief Keith Warren: As part of the court's hearing, the current police chief was called. In the Chief's explanation of why the documents were not provided, the following is revealed, to-wit:

Back in July when I met with Mr. Helfand, I think I got the wrong impression. I thought he wanted the record for everyone that was here from X date to X date, fn3 and that's what we produced. fn4

I've had most of the files ever since I came in October of 1995 after I put them together. They were in about three or four different file cabinets, in a desk drawer, and I compiled everything into one central location. And when Helfand called me last night, I said, "There's no problem. I boxed everything up, and we'll be there first thing in the morning."

(Tr. at Vol. III at 461, lines 22-25)

Why the Secreting of Records Raises
to the Level of Fraud on the Court

4) How the application applies to Rule 60(b) (3). First, fraud is seen by the differing story the witnesses/defense took outside the presence of the jury and the story told before the jury. The jury never knew of defense counsel's and Pete Munoz's statement that Chief Hartner had destroyed the documents was actually a lie. The jury never knew the Officer Munoz' statement as to his not having anything to do with the files was actually different than what he told the Court outside the jury's presence and contradicted by other witnesses. In addition, the jury would never hear Officer Swinney explain that the records were retained, stored and the notion of destruction of the records was simply folly.fn5

The documents secreted by the Defendant and their counsel consisted of some 4,874 pages (summary and documents will be labeled and admitted as Exhibit "25" at the hearing on sanctions). The Fifth Circuit in Rozier v. Ford Motor Co. 573 F.2d 1332, 1339 (5th Cir. 1978) explained that "although Rule 60(b) (3) applies to misconduct in withholding information called for by discovery, . . . it does not require that the information withheld be of such nature as to alter the results in the case." Clearly, the evidence in this case is laden with proof associated with misconduct and fraud in the discovery process. Defendant's counsel initial reaction to the discovery sought was to contend that the information was privileged. After the Court granted the Plaintiff's motion to compel, the Defendant simply ignored the Court's order and failed to produce the materials. As the trial in this matter approached, Defendant sought to restyle the Court's order and had the City Secretary swear to an affidavit (see Order granting sanctions, Doc. 54) as a request for "similarly situated employees." In fact, at the docket call, the defense counsel intentionally misstated the history of the case and pretended to read "similarly situated" in the discovery request when no such words existed in the motion (emphasis added). Even after a letter (facsimile) was forwarded from the Plaintiff's counsel reminding Defendant's counsel of the actual wording

of the request and order, the Defendant's counsel and his client failed to produce the documents. At trial the conduct only got worse.

One could argue that justice is served by the reinstatement of the $5,000.00 sanction against the City Defendant, but the same ignores the true history of this case. Defense counsel's and defendant City would gladly pay a mere five thousand dollar money judgment to avoid liability under the Civil Rights Act. To tolerate counsel's acts, the conduct of the defendant and defendant's agent would encourage further disrespect for our judicial system. In Rozier v. Ford Motor, supra at 1346, the Fifth Circuit stated that the granting of relief under Rule 60 (b) (3) is within the discretion of the trial court. In addition, the Court explained that the rule is remedial and should be liberally construed.

Relief under 60(b) (3) should be granted.

5) Rule 60 (b) (2) and its application. Under Rule 60 (b) (2), the moving party must show that the newly discovered evidence is "such that a new trial would probably produce a new result." Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 143 (5th Cir. 1975). Even under Rule 60(b) (2) a new trial should be granted.

As related to the files produced no training records in the file for the following officers: Stephanie S. Armstrong, Paul Armand, Barry Balthrop, William Wayne Belotte, Robert Dale Boulet, Daniel J. Cantu, Lonny Carney, Anthony Robert Cartwright, Larry Caswell, Christopher Cordary, Mark D. Cruse, William Clareke Dubose, Thomas Lee Fowler, Gary Hartner, David Haynes, and Pauline Hepler. The absence of the training records is critical in context of Texas law requiring the game. In addition, the absence of training records supports the Plaintiff's position that her file not containing records relieving her from the Field Training Procedure is consistent with other files not containing any such information and the officers having successfully completed the Field Training Program.

Training records exist in some officers' file, including Gary Dean Harwell (reflecting the following notation; "I am unable to give you a set schedule, because I am unable to work without Sgt. Munoz." This statement is consistent with Tollett's testimony that she couldn't volunteer time. This information is contrary to the City's position at trial and contrary to Officer Young's testimony that one only had to volunteer time to get off the FTO program. Young being the Plaintiff's comparable was fast-tracked (treated differently) contrary to the Plaintiff's treatment). Also reference to Officer Barry Penland's records which contains counseling forms for reporting to work when training officer not present.

The competence of the Plaintiff is enhanced by negative information contained in other officers files, even though those officers were considered full-time officers.

* Peter Munoz arrested and charged on or about July 28, 1994 with the office of theft by check. On October 28, 1998, the Texas Commission on Law Enforcement reprimanded Munoz (copying the City of Kemah) for the failure to report the criminal offense. This information is not contained in the records produced by the City of Kemah, but the facts came to the Plaintiff's attention after the trial (to be labeled as Exhibit "26", sanctions hearing exhibit).

* Paul Young (the comparable at trial). Personal history questionnaire stated, "I had experimented with marijuana a few times under peer pressure." Young came into the department at the same time as Plaintiff, was given training hours while the Plaintiff was not but also had adverse information in file that the Plaintiff did not. At trial, the Defendant's witnesses stated that no such records for Young existed. The importance of these records is seen in context of the comparison to the Plaintiff's complaint that she could not get the training hours as Officer Young. The training records for Officer Young is telling {Job Interview Documents - Recommendation to hire ("Subject will needs lots at training could make a good officer"; "Mr. Young seems knowledge in Police Procedures. Needs FTO Programs but I feel he would

wake a good officer"; " . with training in our procedures will probably make a good officer. He is worth a try"; "Young needs training"; "Appears eager to learn. Experience limited which shows in difficulty in answering some not very difficult questions."

* Eric Baumgart. Previous criminal history (criminal conviction/Nebraska (1989); criminal charge, Liberty County (1988).

* Michael Heath Butchee - TCLEOSE document reflecting terroristic threat and personal history document reflecting marijuana use (twice)).

* Lonny Carney assaults, multiple reprimands in file.

* Sean P. Friebele - terminated from FTO program for City of League City, but hired by the City of Kemah and placed in FTO program even with past failure .

* John Patrick Kruger - application reveals used marijuana 5 times, driver under the influence of alcohol 4 times.

* Patrick Edwards Zollard. The only officer that sheets are contained in the file. The issue of record keeping time records is important in context of discovery and ultimate cross-examination of the government's witnesses.

* Gerald Franklin Witt. Hired as a full time officer; previous resignation 2/18/91 for incident not reported in file. No FTO documents in the tile. No TCLEOSE Summary Documents in file. One of the issues at trial related to the opportunity given the Plaintiff. Witt would become a comparative person.

And finally reference to the file of David Haynes is important. Contained in the records is a memorandum from Pete Munoz dated 1/8/96 which request Officer Haynes to "compile the total hours for each non-paid for the months of November and December." This memorandum flies directly in the face of the trial testimony of Munoz and the verbal position taken

by the Defendant's counsel. The memorandum also support the fraud on the Court allegations.

The Court should grant relief under Rule 60(b) (2).

6) Rule 37 (b) (2) provides, "[i]f a party or an officer director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, or Rule 35, or if a party fails to obey an order entered under Rule 26 (f), the court in which the action is pending may make such orders in regard to the failure as are just. Coupled with the relief sought under Rule 60 (b) (2) (3) (new trial), the Plaintiff seeks a sanction amount of $150,000.00 (Rule 37 and Rule 11) and attorney fees in the amount of $75,000.00 under the provisions of Rule 37.

The attorney fees are reasonable and necessary in context of the discovery malfeasance and all matters related to same. With respect to billing discretion, the following matters were excluded and/or not billed, to-wit:

a) fees for time on appeal to the Fifth Circuit (approximately 100 hours);

b) fee associated with associate time surrounding review of employment records (approximately twenty hours); and

c) paralegal time that would be duplicative of work performed and/or billed for associate time and/or attorneys time (30 hours).

CONCLUSION

It is prayed that this motion be granted in all parts and that a finding of fraud on the court be entered under Rule 60 (b) (3). Such findings, after hearing, should be directed against both the Defendant City and the Defendant's former counsel,

William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed alternatively that the court find that the newly discovered evidence meets the standard set out herein within with respect to Rule 60 (b) (2) . It is prayed that any such finding, after hearing, be directed against both the City of Kemah and the Defendant's former counsel, William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed that sanctions be entered in the amount of $150,000.00 and such sanctions be entered against both the Defendant City and the Defendant's former counsel, William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed that attorney fees be entered in this matter in the amount of $75,000.00.

After all the above is said and done, a new trial should be granted to the Plaintiff in this matter and/or part and parcel of any such new trial, the striking of the Defendant's pleadings and the entering of judgment for the Plaintiff. No further insult of the federal judiciary should take place but for the conduct of the Defendant and its counsel.

DATE: JANUARY 12, 2000.

Respectfully submitted

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Footnotes

fn1 Rule 60 (b) (2) & Rule 60 (b) (3), Federal Rules of Civil Procedure provides, "{o}n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentations, or other misconduct of an adverse party." The rule also provides that the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken, The final judgment in this matter was entered on March 20, 1998. The appeal to the Fifth Circuit Court of Appeals was taken on June 12, 1998 and affirmed by the Court on September 13, 1999. The Fifth Circuit refused to address the Rule 60 (b) complaint saying that "because this claim was raised for the first time on appeal, we shall not address it. See Shanks v. Allied Signal, Inc., 169 F.3d 988, 993 n. 6 (5th Cir, 1999)."

Even if it is deemed that the Rule 60 (b) (3) complaint herein is untimely (intervening appeal), Rule 60 also provides that "{t}his rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. section 1655, or to set aside a judgment for fraud upon the court." (emphasis added) Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944) (rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause).

fn2 The Defendant's counsel does tell who makes the "allegations" with respect to the record(s) location, but simply floats a number of trial balloons as to why the documents do not exist.

fn3 If this is true, then why weren't these records produced? Why does defense counsel only produce Tollett's records and no others and then tell the Court and the jury that it only had the records for the Plaintiff? How can defense counsel stand before the Court on one occasion and say that his client does not have the records and then on another occasion state "I don't have the records?"

fn4 Clearly, the witness conveys that the records were produced in July. If the witness' statements are true, it would appear that the records were secreted by defense counsel.

fn5 The Defendant stated in discovery that it did not know the location of Officer Swinney. When the Court inquired, outside the presence of the jury, Officer Swinney's current employment was immediately tendered. The importance of Swinney's testimony is readily seen.

CIVIL ACTION NO. H - 96 - 3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

ORDER

On this the 7th day of March, 2000 came on to be heard the Plaintiff's Amended Motion for Sanctions. The Court previously entered sanctions against the City of Kemah, without hearing. The Fifth Circuit Court of Appeals remanded this matter for a hearing for a redetermination and assessment of reasonable attorney's fees and costs under Rule 37. The hearing herein is also based upon Rule 60(b) (3) and Rule 60(b) (2), FED.R.CIV. PROC. and Rule 11, FED.R.CIV. PROC.

After consideration of the testimony taken in the hearing in question, review of the previous trial transcript it is the opinion of the Court that the following order is appropriate in this case, to-wit:

1. The Plaintiff is awarded a new trial in this matter. The trial date shall be set for ___ 2000;

2. The Plaintiff is awarded $150,000.00 in sanctions for the conduct of the Defendant and the Defendant's former counsel, William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery & Helfand;

3. The Plaintiff is awarded $75,000.00 in reasonable and necessary attorneys fees associated with the Court's finding of fraud on the court. Such fees are taxed jointly and severably against both the City of Kemah and William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery and Helfand;

4. It is the finding of this Court the defendant City of Kemah and Defendant's former counsel, William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery and Helfand have engaged in fraud on the court and such fraud was intentional, without regard to truth and designed to stymie the intent of the federal rules of discovery.

DONE AT HOUSTON, TEXAS on this the___ day of ___ 2000.

HONORABLE KENNETH HOYT
UNITED STATES DISTRICT JUDGE